INDEX

	Page
Introduction	1
Question presented	2
Statement of facts	3
Argument	8
Point I—Petitioner's theory of its case depends entirely on an unproven fact—viz., that Prudential's sale to Nelson was a fictitious transaction. The uncontroverted evidence in the case establishes the contrary	8
Point II—Petitioner's alleged case ignores a fundamental rule of brokerage law which absolutely precludes the existence of a cause of action on the facts of this case	10
Point III—Petitioner, having no cause of action, is entitled to no greater standing in Court by reason of its claim of an exclusive agency to lease	13
Point IV—This case presents no conflict between the law applied by the Circuit Court of Appeals and the decisions of the Supreme Court of Alabama	16
Reasons why the petition should be dismissed	18, 19

Cases Cited

Bruce v. *Drake* (1915), 195 Ala. 236, 70 So. 273	11
Cadigan v. *Crabtree* (1901), 179 Mass. 474, 61 N. E. 37	11
Crook v. *Forst* (1897), 116 Ala. 395, 22 So. 540	12
Elliott v. *Kazajian* (1926), 255 Mass. 459, 152 N. E. 351	14
Erswell v. *Ford* (1921), 205 Ala. 494, 88 So. 429	11
Erswell v. *Ford* (1924), 211 Ala. 242, 100 So. 96	17
Handley v. *Shaffer* (1912), 177 Ala. 636, 59 So. 286	10
Hughes v. *Daniel* (1914), 187 Ala. 41, 65 So. 518	16
Ingold v. *Symonds* (1904), 125 Ia. 82, 99 N. W. 713	12

Page

Manning v. *Springfield Institution for Savings* (1945), 317 Mass. 480, 58 N. E. (2d) 817 ..... 11, 12
Millican v. *Haynes* (1925), 212 Ala. 537, 103 So. 564 12
Mobley v. *New York Life Insurance Co.* (1935), 295 U. S. 632 18
Morris v. *Clark* (1918), 202 Ala. 324, 80 So. 406 12
Smith v. *Sharp* (1909), 162 Ala. 433, 50 So. 381 11

TEXTBOOKS CITED

8 Amer. Juris., Brokers, p. 1008, Sec. 41 14
8 Amer. Juris., Brokers, pp. 1014-5, Sec. 57 17
12 Amer. Juris., Contracts, p. 783, Sec. 246 18
2 Mechem's Law of Agency, 2nd Ed., p. 2037, Sec. 2445 12
4 R. C. L., Brokers, p. 317, Sec. 54 14
2 Restatement of the Law of Agency, pp. 1069-70, Sec. 454 14
Williston on Contracts (Rev. Ed., 1937), Vol. 5, p. 3727, Sec. 1325 18

ANNOTATIONS

68 A. L. R. 157 16
30 A. L. R. 572 16

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 135

JACKSON SECURITIES & INVESTMENT COMPANY, A CORPORATION,

Petitioner,

vs.

THE PRUDENTIAL INSURANCE COMPANY OF AMERICA, A CORPORATION,

Respondent

RESPONDENT'S ANSWERING BRIEF

This brief is submitted by The Prudential Insurance Company of America (hereinafter called Prudential), the defendant in the trial court, in answer to the contentions advanced by Jackson Securities & Investment Company (hereinafter called Jackson), the plaintiff in the trial court, in the latter's Petition for a Writ of Certiorari and in its accompanying Brief and Argument.

The decision of this case by the Honorable the Circuit Court of Appeals of the Fifth Circuit is officially reported in 159 F. (2d) 678 as "The Prudential Insurance Company of America, a corporation, Appellant, *v.* Jackson Securities & Investment Company, a corporation, Appellee."

Question Presented

The Respondent submits that the questions set forth on p. 3 of the Petition do not fairly or accurately indicate the issues of this case.

The question which the Circuit Court of Appeals decided, as the language of its opinion makes clear, was the question posed by Prudential in its brief to that Honorable Court in the following language:

> "Where there were two contracts in force between two parties, one constituting the plaintiff the defendant's sales broker to sell properties acquired by the defendant through the foreclosure of mortgage loans and the other constituting the plaintiff the defendant's managing and leasing agent with the duty, among others, to keep the properties tenanted pending their sale, both of which contracts provided remuneration to the plaintiff on a commission basis, and where the Sales Contract reserved the right of the defendant owner to deal directly with a former mortgagor who desired to redeem or buy back a property which he had lost under foreclosure, and expressly provided that, in the event of such sale or redemption, no sales commission would be paid the plaintiff, does the defendant's making such a sale of a property back to its former owner (and thereby precluding the plaintiff's earning further management or leasing fees in connection therewith) give rise to a cause of action in the plaintiff for breach of the Management Contract?
>
> "Stated more tersely, the proposition is simply whether, under the contracts here in litigation, the Owner was under a duty to the Agent to indefinitely retain ownership of its property in order that the Agent might make a brokerage fee by leasing the same."

Statement of Facts

The Respondent is not satisfied with the accuracy, clarity, relevancy or completeness of the Petitioner's Statement as set forth at pp. 5-13 of the Petition, and therefore submits its own Statement of Facts.

The essential facts which control this controversy are simple. Stripped of irrelevancies, those facts are the following:

Prudential had a standing contract with Jackson, the Sales Agreement (Ex. P4),[1] wherein it constituted Jackson its agent to sell all properties which it, Prudential, might acquire in the area of Birmingham, Alabama, as a result of mortgage foreclosures. In addition, Prudential had a standing Management Agreement (Ex. P3) with Jackson which provided that Jackson should rehabilitate, manage, and assist in leasing such foreclosed properties pending their sale. Under the law of Prudential's domicile, it was incumbent upon it to sell such properties within a limited period (Rec. p. 79, ques. 26; p. 449 bottom).

Prudential in 1935 made a mortgage loan to a party named Nelson on property located in Birmingham. Later Prudential foreclosed and, on January 10, 1941, became the owner subject to Nelson's two year statutory right of redemption. Jackson, the standing managing agent, secured a tenant for the property, one Darling, for the period antecedent to the date when Nelson's redemption rights would expire (Ex. P6). Jackson has been paid its commission in connection with this short term lease (Rec. pp. 234-5).

Toward the expiration of the two year period (*i. e.*, in the fall of 1942), Prudential considered two possibilities—

---

[1] Respondent is unable to cite any page in the Record where any of the exhibits may be found because the Petitioner has failed to have these printed. No request was made that counsel for Respondent agree to the omission of the printing of said exhibits.

either selling the property after Nelson's rights should have expired, or making a "long term" lease (Ex. C). Jackson sought to promote a further leasing to Darling (Rec. pp. 276, 311). Prudential never gave Jackson the terms upon which it would be willing to make a new lease (Rec. pp. 285-7). The Management Agreement contained this clause in par. 12 (Ex. P3):

> "The Manager shall have the right to rent said properties or any parts thereof, if vacant or about to become vacant, in such manner and upon such terms and conditions as shall previously have been approved by an officer or authorized representative of the Prudential; *provided, however, that every lease or renting for more than one year must be approved by the Home Office of the Prudential or by the Finance Committee of the Board of Directors of the Prudential before it shall become binding upon the Prudential.*" (Emphasis supplied.)

Darling, desiring to remain in the property, made Prudential two lease offers, both calling for leasings of more than one year's duration. The earlier of these offers was submitted to the Prudential's Birmingham Branch Office through Jackson, and was specifically rejected (Rec. p. 284). The later offer was submitted by Darling direct to the Prudential's Home Office, and was unanswered (Ex. P 17). The Prudential was dissatisfied with Darling as a tenant because of the dilatory manner in which Darling had paid the "overage rent" during its short term lease (Rec. pp. 309-10).

Darling thereupon sued Prudential both in Alabama and New York on the strength of a clause in its short term lease giving it a "first opportunity to negotiate for a renewal . . . on basis satisfactory to the Landlord." The bill filed by Darling in Alabama was dismissed on the merits (Ex. I). In the New York suit, Darling obtained *ex parte* a temporary restraint against Prudential's leasing to any

other party, but, after argument, Darling's motion for a preliminary injunction was denied and the restraining order dismissed (Ex. P. 24; Rec. pp. 98-9).

Prudential at this point (after some inconclusive negotiations with Ann Lewis, a competitor of Darling, which also desired to lease the site—as to which proceedings see Ex. P 35) decided to sell the property back to Nelson, the former owner, which was seeking to "redeem" (Rec. pp. 81-2, ans. to ques. 42; Ex. N; Ex. P 41; Ex. P 47). Nelson was able to finance the repurchase only through Prudential's extending to it a purchase money mortgage of $310,000. Nelson also borrowed of Darling the $30,000 cash which Prudential insisted on having (Ex. P 42, P 47). This borrowing was a separate matter involving only Nelson and Darling (Rec. pp. 479, 511, 534). Nelson promised to lease the property to Darling on certain terms in consideration of the loan advanced by Darling (Ex. P 55). Jackson, the plaintiff, had nothing whatever to do, as broker or otherwise, with either the Prudential's sale of the property to Nelson or Nelson's lease of the property to Darling.

Prudential sold to Nelson without the employment of Jackson, pursuant to a paragraph of the Sales Agreement reading in part as follows (Ex. P 4, par. 16):

> "16. . . . The Prudential expressly reserves the right at its option to deal with any person who had an interest in the property prior to foreclosure or other acquisition of title by the Prudential, and in the event of such dealing, the Broker will not be entitled to any commission for the sale of the property to any person so interested, unless specifically agreed upon by the Prudential in writing. The Broker fully understands that it is the intention and the settled policy of the Prudential to allow a person formerly interested in any particular property to re-acquire title thereto from the Prudential if satisfactory terms can be made, and for such reasons the Prudential has reserved the right

to deal directly with any person formerly interested in the property."

The entire transaction was summarized on the minutes of Prudential's Finance Committee as follows (Ex. P 47):

"We are asked to permit redemption by The Frank Nelson Estate, Inc., our former mortgagor under loan #346265, at $352,000., to be paid $42,000. in cash and $310,000. by a purchase-money mortgage. We will give a quit-claim deed.

"The redemption price represents the amount due this Company on the original mortgage at the date of foreclosure sale, January 10, 1941, plus reimbursement for some improvements and for the advance of taxes, with interest at 5 per cent, after crediting the redemptioner with approximately $24,000. net rents realized by the Company over the period of its ownership and administration of the property. Under the terms of the proposed redemption, we will not credit all of rents received to date, but will retain $8,500. in order to save the Company harmless from extraordinary expenses in connection with the property, including costs of litigation with our tenant, Darling Stores and its Birmingham subsidiary.

"Under the law of Alabama, the Company could insist that redemption be made with 10 per cent interest, or at a figure of approximately $409,000. The Company is also entitled by law to retain all the rents received by it during the period of its ownership, there being no obligation upon it to account to the redemptioner. The above-mentioned concessions to our former mortgagor are proposed for the purpose of doing equity. We avoid taking the unconscionable interest rate permitted by the Alabama statute.

"Of the $42,000. to be paid in cash on consumation of the redemption, $30,000. will be funds of the redemptor, and $12,000. will be paid us by Darling, our tenant, as the balance of overage rent due under its lease which expired December 31, 1942. This sum, when received, will be credited to the Nelson Estate, in a similar manner to the crediting of the $24,000. of rents already received from Darling.

"This redemption will terminate our dispute with Darling as to its alleged right to a renewal of its lease (Darling having arranged to become tenant of the Nelson Estate), and will avoid any grounds of complaint by a competitor of Darling to whom we were about to lease the property, when Darling started suit to enjoin us from that action. Darling will discontinue its suits pending in New York and Alabama, and will pay us rent for its occupancy during the interim between December 31, 1942, and January 10, 1943, the redemption date.

"The terms of the $310,000. mortgage will be as follows:

"Mortgage principal—$310,000.

"Interest rate—4½%.

"Amortization—1% of original principal amount each first 2 years.
1½% 3rd year.
2% 4th year.
2½% 5th year.
3% 6th year and each succeeding year.

"Term—10 years.

"Appraised value (1943) Land and Building $450,000.

"Prepayment privilege #102 for first five years; open prepayments thereafter.

"Prepayment privilege #102 permits payment of not to exceed 20% of original amount of loan in any one year during the first five years, such privilege not to be cumulative.

"Special Provisions:

"Redemptioner to pay all taxes due and payable on or after date of redemption.

"Lease to be satisfactory to P. I. C.; to be subordinated to our mortgage and to be assigned to P. I. C. as collateral security."

* * * * * * *

[Stamped:] "Approved by Finance Committee.
"G.
"Secretary."

ARGUMENT

I

Petitioner's theory of its case depends entirely on an unproven fact—viz., that Prudential's sale to Nelson was fictitious transaction. The uncontroverted evidence in the case establishes the contrary.

A basic proposition, which is entirely unsupported in fact, underlies the Petitioner's case. That basic proposition is that the sale by Prudential to Nelson was a sham. Certainly if the sale was real, as Respondent insists it was, Jackson can have no case at all. If the sale was real, the leasing to Darling was Nelson's act; and if anyone was liable to Jackson for its alleged producing of Darling as tenant, it would have to be Nelson. (But as has been stated, Nelson did not employ any broker to find it a tenant.) Prudential could be liable to pay Jackson a leasing fee only if Jackson had produced Darling to be the Prudential's tenant. And, when the facts are that Prudential did not lease the property to Darling, but sold it to someone else who made a lease, it is elementary that Prudential can have no obligation to pay brokerage in connection with the lease made by its successor in title.[2]

Jackson, in complete disregard of the facts, presents its case as if Nelson was Prudential's dummy and as if the sale to Nelson was a nullity. This is tantamount to charging that the entire transaction was tainted by fraud. So serious a charge should demand some proof, but the only

---

[2] This present case is to be distinguished from one in which the property is sold subject to a lease which contains a renewal option negotiated by the broker between the tenant and the former owner. In that situation some rights in favor of the broker might hang over. But when the Prudential sold the property, Darling's lease had wholly expired. No options or renewal rights remained outstanding. On that point the decree of the Circuit Court of Jefferson County in the injunction suit which Darling brought against Prudential is *res judicata*. (Ex. I.)

evidence submitted by Jackson is certain papers garnered from the Prudential files which merely indicate that Prudential hoped that Nelson would finance its repurchase through Darling. Far from indicating that the sale to Nelson was to be a fictitious cloak, these letters, when read in their entirety, serve only to show the legitimate interest of Prudential in the outcome.

Prudential produced clear and convincing proof of the authenticity of the sale to Nelson. Mr. R. R. Rogers, its Vice President in charge of the transaction, testified (Rec. pp. 81-82, answer to ques. 42) as did also Mr. Frank Nelson, President of Nelson. (Rec. pp. 492-495). The evidence of both denies the possible existence of any secret understanding behind the record documents which are in evidence (Ex. P 52 and Ex P 56). Prudential has no interest in the property today except as the holder of a mortgage (Rec. pp. 492-3).

It is of no legal significance whatever that Darling has arranged to pay a part of the rent accruing under its lease from Nelson, to Prudential in order to make sure that the paramount mortgage is kept in good standing, with Prudential remitting the excess to Nelson after deducting the amounts due on the purchase money mortgage (Rec. pp. 494-5; Ex. P 41). Jackson pretends to believe that these facts establish a tenancy relationship between Prudential and Darling, but the instruments in evidence show this contention to be preposterous (Ex. P. 10, P 53, P 55, P 41, P 42).

For the purpose of simplification, Prudential passes over the question whether the sale to Nelson qualified as a "strict legal redemption" under the Alabama statute. The case does not require the decision of that point. The essential issue is the passage of title out of the Prudential before the leasing to Darling on which Jackson predicates its claim. Once it is established that the sale to Nelson inter-

vened between Prudential's ownership and the lease to Darling, Prudential is dissociated from the very basis of Jackson's claim.

II

Petitioner's alleged case ignores a fundamental rule of brokerage law which absolutely precludes the existence of a cause of action on the facts of this case.

The whole case of the Petitioner rests upon a fundamental misconception of the pertinent rule of brokerage law—a rule as to which there is no difference of opinion between the federal courts and the courts of Alabama. Reference is made to the rule that when a broker is engaged by an owner to bring in offers, the broker has not earned a fee until he brings in an offer which the owner finds acceptable and which the owner accepts. Unless this happens the broker has not produced a deal and is entitled to no compensation for his efforts. If, on the other hand, the owner gives the broker his terms for leasing and the latter produces a prospect ready, willing and able to conclude such a lease, the fee has been earned whether or not the owner goes through with the deal.

This general rule is ably stated in the case of *Handley* v. *Shafffer* (Sup. Ct. of Ala., 1912), 177 Ala. 636, 59 So. 286, as follows:

> "'If the employment is merely to procure a purchaser, without specification as to the price he is to pay, it is evident that no compensation can be recovered by the broker unless the purchaser is accepted by his principal on the principal's own terms. But if the broker is to procure a purchaser on specified terms, and does procure one who is able, ready, and willing to buy on those terms, he is entitled to the compensation agreed on, although, by reason of his principal's fault or refusal, the sale is in fact never made. 19 Cyc. 242, 246.'"

To the same effect as the first quoted sentence see *Manning* v. *Springfield Institution for Savings* (Sup. Jud. Ct. of Mass., 1945), 317 Mass. 480, 58 N. E. (2d) 817, and *Cadigan* v. *Crabtree* (Sup. Jud. Ct. of Mass., 1901), 179 Mass. 474, 61 N. E. 37. Many other cases could be cited from various states.

Further Alabama Supreme Court authority on the same point is found in *Erswell* v. *Ford* (1921), 205 Ala. 494, 88 So. 429; *Bruce* v. *Drake* (1915), 195 Ala. 236, 70 So. 273; *Smith* v. *Sharp* (1909), 162 Ala. 433, 50 So. 381.

Petitioner persists in the intellectual error of ignoring the fact that it never accomplished what was necessary, under the rule just stated, in order for it to earn a fee. It was not enough that Jackson submit leasing offers to Prudential from Darling. It was essential to a recovery by Jackson that Prudential find one of these offers acceptable and accept it. Prudential, not having outlined its terms and being in the market for the best available offer, was free to decline all Darling's offers, if it chose to do so. Nothing in the contractual relationship of the parties gave Jackson the right to insist that Prudential take Darling and thus to foist upon Prudential a tenant which Prudential regarded as undesirable.

Petitioner pretends to believe that Prudential "accepted" Darling when Prudential reviewed the lease from Nelson to Darling (which was pledged by Nelson as collateral security in support of the purchase money mortgage) and then pronounced that lease satisfactory from the standpoint of its being found to call for rentals sufficient to put Nelson in funds to carry the Prudential mortgage. Obviously this was not a landlord's acceptance of a new tenant, which is the "acceptance" the courts are talking about when they lay down the rule of brokerage law relevant to such a case as this.

It is completely dispositive of Jackson's alleged case that Prudential, never having announced its terms, did not ever reach a meeting of the minds with Jackson's prospect, Darling.

What happened in this case was that Prudential sold the property before Jackson ever earned any brokerage. Jackson has no right to complain of the sale because Prudential never undertook that it would not sell whenever it pleased. 2 *Mechem's Law of Agency,* 2nd Ed., p. 2037, Sec. 2445; *Ingold* v. *Symonds* (Sup. Ct. of Ia., 1904), 125 Ia. 82, 99 N. W. 713. See statements to the same effect by the Alabama Supreme Court in *Morris* v. *Clark* (1918), 202 Ala. 324, 80 So. 406 and *Crook* v. *Forst* (1897), 116 Ala. 395, 22 So. 540.

Furthermore, it is unduly speculative for Jackson to claim to have been even indirectly damaged by the occurrence, *i. e.*, the sale, because it can have suffered no loss thereby unless one assumes that, had the Prudential continued to hold the property, Jackson eventually would have submitted an offer from this particular prospect, Darling, which the Prudential Home Office or its Finance Committee would have found acceptable. See *Millican* v. *Haynes* (Sup. Ct. of Ala., 1925), 212 Ala. 537, 103 So. 564; also *Manning* v. *Springfield Institution for Savings, supra,* p. 11.

Such conjectures cannot be reconciled with the reality that Jackson desisted from its efforts in mid November, 1942, or more than six weeks before the sale was arranged (Rec. pp. 305, 310).

III

Petitioner, having no cause of action, is entitled to no greater standing in Court by reason of its claim of an exclusive agency to lease.

Petitioner apparently lays great stress upon its allegation that it was the *exclusive* agent of Prudential. The fact itself is in dispute. Respondent concedes that management functions under the Management Agreement (Ex. P 3) were vested exclusively in Jackson, but in interpreting the contract distinguishes between these functions, on the one hand, and the leasing of the various properties under Jackson's management, on the other hand. Respondent asserts that it is clear from the language of the contract that Prudential could call on other brokers to lease a specific property if it chose to do so, and also that Prudential was not precluded from itself competing with its agent.

However, these discussions, injected into the case by Jackson, were rightly regarded as irrelevant by the Circuit Court of Appeals. They are not relevant because the Prudential did not *lease* the property either itself in competition with Jackson or through another broker, but itself *sold* the property—a matter specifically covered by paragraph 16 of the Sales Agreement (Ex. P 4) quoted *supra* on p. 5.

Petitioner pays considerable attention to the chafferings, prior to the sale to Nelson, between Prudential and Ann Lewis for a leasing. It is not clear why this matter is injected into the case, but the salient fact is that no agreement to lease was ever reached between these parties. The Prudential Finance Committee did authorize a leasing to Ann Lewis but it can be established (a) that the authorization was conditional (Ex. P 26), (b) that news of the authorization was never communicated to Ann Lewis (Ex.

P 27, P 35) and (c) that the terms authorized were materially different from terms submitted by Ann Lewis (Cf. Ex. P 12, particularly par. 15, and Ex. P 26).

If the claim of an exclusive agency to lease is advanced by the Petitioner with a view to strengthening its statement that it is the duty of a principal to deal with his *exclusive* agent in good faith, the emphasized word is surplusage. The law requires that an owner treat with any agent employed by him in good faith. Bad faith in brokerage cases, however, is not undefined, but is described at length in many cases, in Alabama and elsewhere, with full and specific details as to how certain parties went about pickpocketing their brokers out of earned or virtually earned commissions.

The Petitioner has apparently not studied the rule of law of the bad faith cases, as it shows total unfamiliarity with that rule. The basic proposition is stated as follows in *Elliott* v. *Kazajian* (Sup. Jud. Ct. of Mass., 1926), 255 Mass. 459, 152 N. E. 351:

> "The right to revoke [an agent's authority] is not dependent upon the reasons which may lead to its exercise, provided that it is exercised in good faith, which here means for any reason other than to obtain the results of the broker's efforts without paying for them."
>
> • • • • • • •
>
> "The cases in which such bad faith has been found to exist are cases in which a sale has later been made. Profit from the plaintiff's exertions seems essential to proof of bad faith."

And see to the same effect 2 Restatement of the Law of Agency, pp. 1069-70, Sec. 454; 4 R. C. L., Brokers, p. 317, Sec. 54; 8 Amer. Juris., Brokers, p. 1008, Sec. 41.

It follows that in the instant case an essential element is lacking in that no deal between Prudential and Darling ever

occurred. Prudential did not "run around" its broker, Jackson, to make a lease with Jackson's prospect, Darling, but instead sold the property *bona fide* to a third party.

Even if it could be shown that Nelson was merely a dummy for Prudential in taking title, thus lending some credence to Petitioner's allegation that Nelson's lease to Darling is in reality Prudential's, it would not follow that Prudential was liable to Jackson under the rule of the bad faith cases. It would be an essential condition to its recovery that Jackson show that the real reason for Prudential's action in using a dummy was to avoid paying Jackson an *earned or virtually earned* fee,[3] and not because Prudential wanted to dispose of the Darling litigation or to rid itself of the property in compliance with the law of its domiciliary state. In the voluminous record there is no evidence even remotely touching upon Prudential's intentions toward Jackson in the matter of any Darling fees.

Lacking the specific elements of a bad faith case, the Petitioner, throughout the course of this litigation, has attempted to supply the deficiency by loose charges of fraud (which is not alleged in its pleadings) and overbearing conduct on the part of Prudential in connection with collateral matters, such as Prudential's alleged relations with other parties, viz., Darling and Ann Lewis. It it not shown by the Petitioner, and cannot be shown, that the alleged actions involving Prudential and those third parties, touched Jackson's interests in any way since Jackson had quit all its efforts with respect to the property many weeks before the sale to Nelson was negotiated. Jackson's efforts had already ended in complete failure (Rec. pp. 305, 310).

---

[3] It has already been demonstrated under Point II, *supra*, that because the ready, willing and able rule does not apply to this case, Jackson cannot establish this prerequisite fact. Jackson could not earn a fee, or virtually earn one, without a favorable action by Prudential's Home Office or Finance Committee.

IV

This case presents no conflict between the law applied by the Circuit Court of Appeals and the decisions of the Supreme Court of Alabama.

In the first point made in its Brief, at pp. 15-16, Petitioner adverts to a general rule of contract law which it claims has been ignored by the Circuit Court of Appeals. Wholly misconceiving the nature and scope of bad faith as defined in the brokerage cases, Petitioner complains, in the last paragraph at the bottom of p. 16, of Prudential's alleged refusal to negotiate with Darling. The law is clear enough that such a clause as that in the short term lease from Prudential to Darling under which Darling claimed a "first right to negotiate" and asserted that a corresponding duty to negotiate rested on Prudential, is uniformly held void for uncertainty in all jurisdictions. See *Annotations* at 68 ALR 157 and 30 ALR 572. But if it should be supposed that Prudential owed Darling a duty to negotiate, how does Jackson, a mere agent and the Prudential's agent rather than Darling's, come to be a third party beneficiary of that contract to the extent that it can claim damages of Prudential because of Prudential's alleged refusal to negotiate with Darling?

In *Hughes* v. *Daniel* (Sup. Ct. of Ala. 1914), 187 Ala. 41, 65 So. 518, the broker was accorded no such prerogative, the court saying:

> ". . . Plaintiff was not a party. He was a mere middleman, a broker. He was to receive a benefit, but his right depended upon the execution of an agreement between the negotiating principals. As for any right of plaintiff, the principals negotiating for a contract were free to insist upon their own terms."

The legal authority which Petitioner submits on the general point of contract law at pp. 15-16 of its Brief is not relevant because when one turns to the contract which defines Jackson's agency in the matter of Prudential leasings, the Management Agreement (Ex. P 3), one finds that Jackson is employed merely to submit offers. That is all that is required of Jackson in the matter of leasings of over one year's duration. Therefore, it is specious for Petitioner now to contend that it was prevented from performing its contract, *i. e.* from submitting offers to Prudential, by Prudential's refusal to make Darling any counter-offer.

The supposed conflict between the law applied by the Circuit Court of Appeals and the law announced by the Supreme Court of Alabama does not exist. Respondent agrees with the law cited in Petitioner's Brief under its Point I A, and also with the Alabama law cited elsewhere in the Petitioner's Brief, but simply points out that all these propositions are irrelevant to the issue of the instant case.

Moreover, in its Point I B, Petitioner again falls into error as to elementary law. In citing *Erswell* v. *Ford* (Sup. Ct. of Ala., 1924) 211 Ala. 242, 100 So. 96, as an applicable precedent, Petitioner fails to note the distinction between an *exclusive agency* to lease, on the one hand, and an *exclusive right* to lease, on the other hand. For a statement of the correct rule of law see 8 *Amer. Juris.*, Brokers, pp. 1014-5, sec. 57. This distinction demonstrates the invalidity of the assertion made by Petitioner at the commencement of its sub-point B on p. 18. The Petitioner's short statement of the matter involved, on p. 2 of the Petition, is predicated on this same error.

If *Erswell* v. *Ford* is cited by the Petitioner for the purpose of establishing a right of action in itself for anticipatory breach in connection with Prudential's alleged leasing

to Ann Lewis, as appears by the concluding sentence of this sub-point B on p. 19, a complete legal defense is afforded Prudential by the factor of good faith. See *Williston on Contracts* (Rev. Ed., 1937) Vol. 5, p. 3727, sec. 1325, citing *Mobley* v. *New York Life Insurance Co.* (1935) 295 U. S. 632. There is no proof in this case that Prudential, when it chaffered with Ann Lewis, did not in good faith construe the Management Agreement (Ex. P 3) as constituting Jackson a *non-exclusive* agent to lease.[4] Respondent still, moreover, vigorously insists that a reading of the entire contract will convince any fair mind that Jackson did not have an exclusive agency to do anything more than manage, excluding leasing from the term "manage."

Under its Point IV, the Petitioner contends, at p. 21 of its Brief, that the Circuit Court of Appeals has construed the Management Agreement (Ex. P3) and the sales Agreement (Ex. P 4) as one instrument, and that this is contrary to Alabama law. Respondent does not concede the premise. As Respondent sees it, the Circuit Court of Appeals has construed each instrument separately with due regard to the contractual relationship existing between the parties (see 12 *Amer. Juris.*, Contracts, p. 783, sec. 246) and has correctly applied the Sales Agreement to the transaction in this case, which was a sale by Prudential to the former owner Nelson, and not, as Petitioner so persistently asserts, a leasing to Darling.

The Respondent submits that the Petition for a Writ of Certiorari should be dismissed for the following reasons:

1. The case does not involve a decision by the Circuit Court of Appeals of a point of local law in a way contrary

---

[4] Strictly speaking, Jackson was not an agent to lease, since Prudential furnished no terms, but was merely an agent to bring in offers, as already stated.

to, or in conflict with, the decisions on the same point by the court of last resort of the State of Alabama.

2. The case presents no question of public importance, turns upon the interpretation of certain specialized contracts between the parties, and its outcome is of concern only to the parties.

3. The case as presented by the Petitioner involves issues of fact, requiring a review of the evidence.

4. The Petition discloses no departure by the Circuit Court of Appeals from the usual course of judicial procedure.

5. The Petition does not contain a clear, definite and complete disclosure of the controversy between the parties.

6. The record submitted with the Petition does not comply with Rule 38 of this Honorable Court in that the Petitioner has omitted to print Exhibits P 1 through P 59 and also Exhibits A through Q, and this without asking counsel for the Respondent to agree to the omission of any of the said exhibits from the record.

Respectfully submitted,

FRANCIS H. HARE,
Attorney for Respondent,
The Prudential Insurance
Company of America.